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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PETER ALLEN, *et al.*,

Plaintiffs,

v.

19 Civ. 8173 (LAP)

CARL KOENIGSMANN, *et al.*,

Defendants.

Telephone Conference

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New York, N.Y.  
September 1, 2023  
10:00 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

LAW OFFICE OF AMY JANE AGNEW, P.C.

Attorneys for Plaintiffs

BY: AMY JANE AGNEW

JOSHUA LEE MORRISON

WHITEMAN OSTERMAN & HANNA L.L.P.

Attorneys for Defendant Moores

BY: ORIANA L. KILEY

WILLIAM S. NOLAN

CHRISTINA F. VITOLO

Also Present:

Baron Jones and Shira Navatian, Law Students

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(The Court and all parties present remotely)

THE COURT: Good morning, counsel. Judge Preska here.

MS. AGNEW: Good morning, your Honor. A.J. Agnew.

THE COURT: Ms. Agnew for plaintiff. Who else?

MR. MORRISON: Mr. Morrison's here as well.

MS. AGNEW: We also have Baron Jones and Shira Navatian, who are law students who will be participating in the trial.

THE COURT: You will ask them to spell their names for the court reporter, right?

MS. AGNEW: I will. Here we go.

MR. JONES: Good morning. This is Baron Jones for the plaintiffs. B-a-r-o-n. Last name Jones, J-o-n-e-s.

THE COURT: Thank you.

MS. NAVATIAN: Good morning, Shira, S-h-i-r-a, N-a-v-a-t-i-a-n.

MS. KILEY: Oriana Kylie on behalf of Dr. Moores. I'm joined with Will Nolan, Jennifer Thomas, and Christina Vitolo from my office. Thank you.

THE COURT: Thank you very much. Good morning. Have you folks had an opportunity to chat further about the items raised in your letters?

MS. AGNEW: We have not, your Honor. After we received — we did receive the letter that Ms. Kiley filed last night with the footnote suggesting this wasn't a marriage

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1 trial, but we have not been able to discuss that with her since  
2 then.

3 THE COURT: I'm sorry, who is speaking, please?

4 MS. AGNEW: That was A.J. Agnew, madam reporter. I  
5 will identify myself moving forward.

6 THE COURT: Thank you.

7 Ms. Kiley, did you want to elaborate on your footnote  
8 position on the trial on the merits?

9 MS. KILEY: Your Honor, it was solely to reiterate an  
10 argument that was previously made when the Court determined  
11 that it would decide the need for a permanent injunction prior  
12 to a the trial on the merits when the individually named  
13 defendants were still in the case.

14 THE COURT: All right. I'm not sure I understand the  
15 difference between converting the preliminary injunction into a  
16 permanent injunction and a trial on the merits. What do we  
17 think the difference is?

18 MS. KILEY: Your Honor, my understanding from a  
19 reading of virtually all the case law is that typically a trial  
20 on the merits would proceed first and then after that  
21 determination, the Court would determine a need for a permanent  
22 injunction. Here, the Court has determined that there will be  
23 no trial on the merits and that we will just decide the need  
24 for the permanent injunction. Again, it was just preserving an  
25 argument that was previously made, that is all.

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1 THE COURT: But I still don't understand what issues  
2 would be tried in a trial on the merits that are not going to  
3 be tried in the motion to convert the preliminary injunction  
4 into a permanent injunction.

5 MS. KILEY: Your Honor, a trial on the merits would  
6 have been solely for the plaintiff to prove deliberate  
7 indifference as to medical care as to individually named  
8 defendants, which, as we know, is not the case right now.

9 Our understanding is that the trial that is going to  
10 begin on Tuesday is for a permanent injunction, and in order to  
11 do that, there is a four-factor test which includes within it  
12 an analysis and it requires a showing of actual success on the  
13 merits of deliberate indifference. That is a piece of the  
14 four-part test. We were — we, obviously —

15 THE COURT: So tell me again, what would be tried in a  
16 trial on the merits that will not be tried in the motion to  
17 convert the PI to a permanent injunction?

18 MS. KILEY: Your Honor, respectfully, we've never seen  
19 a motion to convert the preliminary injunction into a  
20 permanent. We were just told that we were proceeding to trial  
21 on a permanent injunction. And again, we highlight that there  
22 is a four-factor test, and that is plaintiffs' burden.

23 THE COURT: Counsel, I understand there's a  
24 four-factor test. We went through the factors in a preliminary  
25 injunction hearing. Tell me the answer to my question.

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1 MS. KILEY: I'm sorry, can you repeat the question?

2 THE COURT: Certainly.

3 What issue do you say should be tried in a trial on  
4 the merits that will not be tried in the motion to convert the  
5 preliminary injunction into a permanent injunction?

6 MS. KILEY: I'm sorry, your Honor, respectfully, we  
7 never reviewed any motion papers to convert a preliminary  
8 injunction, nor have we seen any on the docket.

9 THE COURT: Counsel, answer my — OK. Ms. Agnew, what  
10 do you say we're doing on Tuesday?

11 MS. AGNEW: Your Honor, it's plaintiff's class's  
12 position that we will be proving that the plaintiff class has  
13 suffered a pattern of ongoing constitutional violations by the  
14 denial or discontinuation of their respective medical treatment  
15 and that the Court needs to enter a permanent injunction to  
16 ensure that the irreparable harm not only ceases but that there  
17 is no risk of that harm moving forward.

18 THE COURT: You acknowledge the four-factor test that  
19 Ms. Kiley referenced, right?

20 MS. AGNEW: Of course, your Honor. I think that the  
21 — my understanding is the confusion among the parties is we  
22 will be proving the merits of the class's claims not any given  
23 plaintiff against any given defendant in the second amended  
24 complaint. I can't speak for Ms. Kiley, but this is why I  
25 think we need a pretrial order, your Honor, because I'm looking

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1 at a footnote. It says there will be no trial on the merits  
2 when, in fact, we're about ready to try the merits of the  
3 class's claim.

4 THE COURT: That's why I am asking you, Ms. Kiley,  
5 which issue do you say should be included in the trial on the  
6 merits that is not to be included in the motion to convert the  
7 preliminary injunction to a permanent injunction?

8 MR. NOLAN: Your Honor, this is Mr. Nolan. If I may  
9 jump in for a second?

10 THE COURT: Yes, sir. Good morning, Mr. Nolan.

11 MR. NOLAN: Good morning, Judge.

12 We agree this is a trial on the merits and that it's  
13 on the four-factor test. I don't think that — I think we're  
14 unnecessarily getting into semantics between a trial on the  
15 merits and a motion to convert. As far as we're concerned,  
16 this is a trial on the merits. And in terms of — we were not  
17 aware of any motion to convert, so I don't want to get into an  
18 academic exercise over it. The four-factor test, I think we  
19 all agree, applies.

20 THE COURT: One of the reasons we're here, of course,  
21 is because the statute prescribes that a preliminary injunction  
22 expires after 90 days, right? Isn't that why we're here at  
23 this particular moment in time?

24 MR. NOLAN: Yes.

25 THE COURT: Then I think my question was, looking at

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1 the footnote 1 in Ms. Kiley's August 31 letter, Dkt. No. 764,  
2 it says: "The Court has determined that we would proceed with  
3 a trial on the need for permanent injunction absent a trial on  
4 the merits."

5 I think I just heard you say that you agree,  
6 Mr. Nolan, that this is a trial on the merits. That was my  
7 view as well.

8 Does anyone disagree with that?

9 MR. NOLAN: No.

10 THE COURT: All right. Then what else do you people  
11 want to talk about?

12 MS. AGNEW: Your Honor, I would like to submit a  
13 conforming pretrial order for the Court to sign so that there  
14 is no confusion when we start this on Tuesday. And I'll be  
15 very straightforward and say that there are these appeal issues  
16 that they've already raised. I don't want to deal with them on  
17 appeal again. We've heard several times: We don't know what  
18 this case is about, we're not prepared, we don't know, we don't  
19 know, we don't know. I have to — I have an obligation to my  
20 clients to make sure that there's no confusion walking into  
21 this trial.

22 THE COURT: So what is it that you think has to go  
23 into the pretrial order?

24 MS. AGNEW: I think we have to have an enunciation of  
25 the issues to be tried. And forgive me, your Honor, this is

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1 the first trial on the merits I've ever walked into where I  
2 didn't have a JPTO. And I'm a little bit at a loss as to why  
3 we don't, but here we are, and we've got four calendar days  
4 till we commence trial.

5 THE COURT: Ms. Kiley, Mr. Nolan.

6 MR. NOLAN: Your Honor, I think we just established  
7 what the trial is about. It's about the four-factor test.  
8 It's plaintiffs' burden of proof. We're going to oppose that  
9 burden of proof, and we're — obviously, on the legal side of  
10 things, there are legal defenses that we have that may or may  
11 not require a lot of factual development at trial. We  
12 certainly reserve our right to raise arguments about those.

13 But, essentially, we have a trial on the merits.  
14 There's a four-factor test. We're going to oppose proof that  
15 plaintiff puts in. And as far as I understand, your Honor will  
16 then make a decision.

17 THE COURT: What are the arguments on other issues  
18 that you expect to present?

19 MR. NOLAN: Your Honor, I think we will — any of our  
20 affirmative defenses may be in play. At this point, obviously,  
21 we have legal —

22 THE COURT: We probably need to know which ones we're  
23 going to be dealing with and whether there's going to be  
24 evidence on them. I have Dr. Moores' amended pretrial order,  
25 and it lists 859 witnesses. That's a little difficult, at



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1 least for me, to understand unless each one is going to be  
2 asked to say his or her name. That's why we need to know what  
3 we are trying here.

4 So what issues —

5 MR. NOLAN: Your Honor —

6 THE COURT: Go ahead.

7 MR. NOLAN: Sorry. Sorry to interrupt.

8 As to the witnesses, your Honor, we just included as  
9 many that could potentially be rebuttal witnesses. But we  
10 expect to call the providers in response to any claims made by  
11 the class members about those providers' care.

12 THE COURT: Well, I know I counted 38 witnesses on  
13 your list. Certainly, one usually is not required to list  
14 one's rebuttal witnesses. Which witnesses do you intend to  
15 call in your case in chief?

16 MR. NOLAN: We will call the corresponding provider to  
17 each of the plaintiff class members who testify if we feel it's  
18 necessary. Right now, without knowing who plaintiff is going  
19 to call, it's unclear who we're going to call. We also  
20 probably intend to put on Dr. Moores at this point as our main  
21 sort of summary overall witness as well.

22 THE COURT: What will Dr. Moores testify to?

23 MR. NOLAN: Depends on what the plaintiffs' proof is  
24 your Honor.

25 THE COURT: You just told me that she's going to be

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1 your overall general witness. You must have some idea.

2 MR. NOLAN: Well, I think some of the testimony will  
3 touch on the same issues that were in play at the preliminary  
4 injunction phase, but certainly, we're going to testify — it's  
5 really going to be a response to what plaintiff puts in. If  
6 plaintiff doesn't meet her burden of proof, we may not call her  
7 at all.

8 THE COURT: So what about the mootness elephant in the  
9 room?

10 MR. NOLAN: Well, I think we have to wait and see what  
11 the proof is, but if the plaintiff puts in — is unable to meet  
12 their burden of proof, we don't need to raise mootness. And  
13 that's where you get into the tension between whether or not  
14 plaintiff can prove the existence of an ongoing harm for the  
15 class and whether there's mootness.

16 So the two are tied together, right? So it may be  
17 that we don't need to raise the issue of mootness at all if  
18 plaintiff can't prove an ongoing harm.

19 THE COURT: Let us assume that one or more of the  
20 witnesses called by plaintiff testifies that he or she has been  
21 denied, let's just say, her pain medication upon transfer to a  
22 new facility. Then what?

23 MR. NOLAN: You know, I can't get into hypotheticals  
24 at this point, your Honor. If there — I'd have to understand  
25 the context. If plaintiff wants to preview their case, we're

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1 happy to listen.

2 THE COURT: Counsel, you're not helping any here.

3 All right. Ms. Agnew, what do you say is required in  
4 a new pretrial order, having heard Mr. Nolan's presentation?

5 MS. AGNEW: Well, I certainly think, your Honor, we  
6 need an enunciation of the issues to be tried. That can be the  
7 four-factor test, certainly, but we also need to have it  
8 distilled as to what the merits being tried are, because I am  
9 not convinced that we're on the same page.

10 If we can't solidify a witness list, I think that's  
11 fine, but I also think we need the Court to order the exhibits,  
12 and I'll tell you why, your Honor. For instance, I imagine  
13 Dr. Moores is going to testify that she's trained all of these  
14 providers in conformity with the Court's preliminary  
15 injunction. However, we have never received any documents  
16 demonstrating that, despite Rule 26's obligation to tender any  
17 documents that support a position.

18 So we're a little flummoxed how, walking into a trial  
19 where there are obviously going to argue mootness, obviously,  
20 we don't have the proof. And as soon as she opens her mouth, I  
21 am going to start moving to preclude that testimony because no  
22 proofs were offered or tendered in the normal course.

23 So let's get the exhibits signed off on, let's get the  
24 issues that are to be tried, and if we can't agree on  
25 witnesses, that's fine.

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1 THE COURT: So in the first instance, I assume you  
2 would tender the issues to be tried, and I think — and forgive  
3 me, I don't have it right in front of me, but I think your  
4 proposed pretrial order had a list of exhibits, is that right?

5 MS. AGNEW: Yes, your Honor. I think they both do,  
6 and they mimic each other pretty closely. But, again, as of  
7 right now, defendants' list does not include a lot of the  
8 proofs that she would need to argue mootness. So I think we  
9 need to get that signed off so that we all know what's going to  
10 walk in the door when this trial starts.

11 THE COURT: OK.

12 MR. NOLAN: Your Honor, can I respond?

13 THE COURT: Mr. Nolan, I take it that you will put in  
14 your view of the issues to be tried, correct?

15 MR. NOLAN: Yes. I will point out I think one issue  
16 that — of clarification here is that I think  
17 plaintiffs' position is that the trial is a test of whether or  
18 not the preliminary injunction has been complied with. We  
19 don't agree with that. We believe that to prove a permanent  
20 injunction, you still have to go to the underlying merits of  
21 the case. That is the way that we're preparing for this trial.  
22 We don't believe it's a test of compliance necessarily. I  
23 understand that if this was about mootness of the PI that might  
24 be an issue, but we don't really see that this is — this isn't  
25 a motion for contempt at this point, and I think that's where

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1 plaintiff is trying to push the case. But, again, we think  
2 it's a trial on the merits, the four-factor test. It's the  
3 plaintiffs' case.

4 THE COURT: But I just asked you, am I correct, you  
5 will list the issues to be tried? And by that I mean not just  
6 the four-factor test, but you apparently have additional issues  
7 that you want to at least make argument on, right? Isn't that  
8 what you just told me?

9 MR. NOLAN: We may, depending on what plaintiff puts  
10 in. That's, I think, the test. We reserve our right to raise  
11 any defenses that we raised in our answer to anything that  
12 plaintiff has said, but we don't know.

13 THE COURT: Let me just say this: I'm not going to  
14 hear anything about documents that haven't been produced. OK?  
15 Do we understand each other?

16 MR. NOLAN: Of course.

17 THE COURT: So on training documents, if there's going  
18 to be testimony by Dr. Moores that her subordinates have been  
19 trained, if those documents haven't been produced, we're not  
20 going to hear that testimony. It also seems to me that  
21 whatever you think you're going to try, you have to list it,  
22 right? I don't care about a rebuttal where, say, a provider  
23 gets on the stand and says, No, absolutely not. This inmate  
24 was provided with medication every day. That's one thing. But  
25 if there are other issues — and I thought you told me that

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1 there are issues you intend, as you sit here now, to make  
2 argument on — they had better be listed.

3 Do you disagree?

4 MR. NOLAN: Sorry.

5 THE COURT: Go ahead.

6 MR. NOLAN: What I was referring to is, for example,  
7 subject matter jurisdiction. Certainly, that's not a factual  
8 issue at this point, but it is something that we want to  
9 preserve. But items like that, I'm happy to list that.

10 THE COURT: Why don't you — exactly. So why don't  
11 you just say: And defendants continue in their objections to,  
12 one, subject matter jurisdiction; two, whatever it is.

13 All right. Any reason not to do that?

14 MR. NOLAN: That's fair.

15 THE COURT: Will you people — it sounds like you  
16 haven't conferred on admissibility of documents. Is there any  
17 reason you can't do that? I mean, you both listed all your  
18 documents.

19 MR. NOLAN: In fact, your Honor, we proposed to  
20 identify all of the exhibits that we would identify as  
21 admissible or admitted at the beginning of trial by looking at  
22 each other's exhibit lists, and so I think that's something we  
23 can do and I'm happy to do.

24 THE COURT: You should do it in advance of trial. I'm  
25 looking at Dr. Moores' amended pretrial order. There's a whole

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1 list of things.

2 MR. NOLAN: We will proposing —

3 THE COURT: You people should go through each other's  
4 lists and figure out if there remain any documents about which  
5 you disagree about admissibility and let me know what those  
6 are.

7 Can we do that?

8 MS. AGNEW: Your Honor, if I may, this is A.J. Agnew.

9 We've actually gone back and forth, and we did not  
10 challenge the admissibility of any document. We are going to  
11 ask that defendants lay a proper foundation. Our concern is  
12 that they're going to throw medical records at our clients  
13 who've never seen them and don't know the contents, right?  
14 But, certainly, I've already said if you have a provider on the  
15 stand who wrote medical records, I'm not going to make you lay  
16 a foundation, right? We'll stipulate to that right there.

17 So, unfortunately, this case is a little off the  
18 rails. I don't know why. We don't have an issue with the  
19 admissibility of anything subject to a proper foundation being  
20 laid.

21 MR. NOLAN: Your Honor, I just want to clarify a  
22 point.

23 THE COURT: Go ahead.

24 MR. NOLAN: Which is something's not really going to  
25 be admissible without foundation. So if we're stipulating to

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1 admissibility, you're stipulating to foundation.

2 THE COURT: All right. Well, look, just remember,  
3 time is tagged to whoever's talking, and if it turns out that  
4 there is needless talking, time will be adjusted. So you  
5 people better get your act together as to what you're talking  
6 about.

7 What else? The only thing I see outstanding is  
8 Dr. Mueller. What's the situation with Dr. Mueller, please?

9 MS. AGNEW: So, your Honor, it's A.J. Agnew.

10 We've offered to send a car service for her, and she  
11 accepted that offer, so we will.

12 THE COURT: OK.

13 MS. AGNEW: We're going to get her transportation to  
14 and from the courthouse. My understanding is she'll be here to  
15 testify.

16 And I do think, though, we do have the issue of the  
17 docket, the actual citation, your Honor. Again, I circulated a  
18 voluntary dismissal to Ms. Kiley twice yesterday that everyone  
19 else has signed on. She doesn't want to sign it, or she hasn't  
20 signed it. I have some concerns this is about their  
21 preservation of the severance shouldn't have happened. I get  
22 it, but we need this docket cleaned up.

23 And I will just say, for the Court's clarification, we  
24 signed in the — we filed in the multidistrict litigation  
25 panel, and we are having problems because this docket is a



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1 little bit wonky, so to speak. So I do want to get that  
2 cleaned up, and I'm happy to send over a proposed form of order  
3 for that as well.

4 THE COURT: Ms. Kiley.

5 MR. NOLAN: Your Honor, it's Mr. Nolan.

6 Ms. Kiley and I conferred yesterday about this, and we  
7 were going to get back to Ms. Agnew because it was the first  
8 that we had received a request to sign. Our concern is that  
9 the caption on that document does not match the current caption  
10 in any way of the current litigation, and so it just doesn't —  
11 I'm not comfortable signing something that doesn't match our  
12 caption because it looks like it's a different case.

13 THE COURT: But we have very easy ways to fix that.  
14 We just agree as to what the correct caption should be.

15 Is there a reason you guys can't do that?

16 MR. NOLAN: I don't know. We just saw the — we just  
17 saw this for the first time yesterday.

18 THE COURT: Why don't you talk to each other and put  
19 together whatever you think the caption ought to be, and then  
20 put together and sign the stipulation under the new caption,  
21 right?

22 MS. AGNEW: Your Honor, if I may, this is A.J. Agnew.

23 The caption was already fixed in the Second Circuit.  
24 In fact, we spent hours on this in getting it fixed. This is  
25 not the first time they've seen it, and we have a letter to the

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1 Second Circuit agreeing to the change in the caption.

2 Forgive me, I feel like I'm beating my head against  
3 the wall over silly, silly, things.

4 MR. NOLAN: That's exactly our point. The caption is  
5 not the same — the caption is not the one that we saw in the  
6 Second Circuit; it's different.

7 THE COURT: Mr. Nolan, Mr. Nolan, what's the problem  
8 with the caption?

9 MR. NOLAN: The caption doesn't match the new caption.  
10 This is an old caption that we're looking — or different  
11 caption. There are all sorts of names —

12 THE COURT: What do you think the caption ought to be?

13 MR. NOLAN: I think it should match the Daniels,  
14 Rahman, Cruz, Mathis caption. I guess we can work this out,  
15 your Honor. I'm happy to look at it with Ms. Agnew.

16 THE COURT: All right.

17 MR. NOLAN: But the caption sent yesterday didn't look  
18 that way.

19 THE COURT: Let's put our big boy pants on, everybody,  
20 and sit down and work it out. This can't be that difficult,  
21 and it is really not of much consequence.

22 What else do we have to discuss, friends? When will  
23 you be submitting these documents? Saturday? What day is  
24 today? Saturday night? Saturday, 5 o'clock?

25 MS. AGNEW: Sure. And, your Honor, if the parties

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1 can't agree, are you — do you want us to do a proposed form of  
2 order with the position of each?

3 THE COURT: Yes.

4 MS. AGNEW: OK.

5 THE COURT: I would be shocked if you can't get your  
6 acts together to agree.

7 What else, friends?

8 MS. AGNEW: That's all from plaintiff, your Honor.

9 MR. NOLAN: One quick issue for defendants, your  
10 Honor. Just in terms of planning and given the constraints on  
11 timing, would you — we may or may not have time to give  
12 closings. We, if plaintiff and the Court is amenable, would be  
13 willing to stipulate to the preliminary injunction continuing  
14 for a short period of time in order to do some form of  
15 post-hearing brief the way we did the last time, and I just  
16 wanted to raise that as a possible —

17 THE COURT: That sounds like a plan.

18 Ms. Agnew, is that all right with you?

19 MS. AGNEW: If by short he means seven days, sure. If  
20 by short he means an additional 90 days, I can't agree to that,  
21 your Honor.

22 THE COURT: No, look, I'm looking for posttrial  
23 briefing within a week. It's hard to keep these things in your  
24 head, especially we're going to be starting a criminal trial on  
25 Wednesday, the 13th. So you people need to get your briefs in

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1 within a week.

2 MS. AGNEW: OK. Forgive me, your Honor. This is A.J.  
3 Agnew.

4 We are actually starting a federal trial in front of  
5 Judge D'Agostino the following Monday. So what we would  
6 suggest is like after the preliminary injunction, defendants  
7 can put in their posttrial brief, and we'll do a response  
8 within five days. But you'll forgive me, we're trying back to  
9 back two very big trials, and we have two attorneys.

10 THE COURT: All right. Is that all right with you,  
11 Mr. Nolan?

12 MR. NOLAN: I would propose simultaneous briefing  
13 since it's plaintiffs' burden of proof. I mean, I don't see  
14 why we have to put one in so they can respond to it. It's  
15 probably easier if we just agree on — whether it's 30 days, if  
16 they need it, that's fine, but either — I think we should  
17 just —

18 THE COURT: You people agree on a date, but not as  
19 long as 30 days, and let me know what you agree on. And then,  
20 obviously, you will agree to extend the preliminary injunction  
21 until, let's just say, two weeks after the posttrial briefing.

22 MR. NOLAN: Yes.

23 THE COURT: Anything else today, friends?

24 Ms. Reporter, do you need anything from any of us?

25 THE REPORTER: No, thank you.

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1 THE COURT: Thanks very much. Good morning, friends.  
2 Thank you for being on.

3 MS. AGNEW: Thank you, your Honor.

4 (Adjourned)